JUDICIAL COUNCIL OF CALIFORNIA

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INVITATION TO COMMENT

W23-11

Title
Jury Instructions: Public Access and Publication

Action Requested
Review and submit comments by January 20, 2023

Proposed Rules, Forms, Standards, or Statutes
Revise Cal. Rules of Court, rule 2.1050

Proposed Effective Date
April 1, 2023

Proposed by
Rules Committee
Hon. Carin T. Fujisaki, Chair

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Executive Summary and Origin

The Rules Committee recommends revising California Rules of Court, rule 2.1050, to express the council's continued interest in both free public access to the *Judicial Council of California Civil Jury Instructions* (*CACI*) and the *Judicial Council of California Criminal Jury Instructions* (*CALCRIM*) and having publishers accurately publish the instructions, properly attribute the council as the source of the instructions, and not claim copyright in them. This proposal originated with a suggestion from a nonprofit organization following a change in copyright law that impacts government bodies.

Background

In 2005, the council amended former rule 855, now renumbered as rule 2.1050, on the recommendation of the Task Force on Civil Jury Instructions, to ensure that publication of the instructions by commercial publishers did not occur without the council's permission, including ensuring that commercial publishers publish the instructions accurately, credit the council as the source of the instructions, and do not claim copyright of the instructions. The council at the same time reaffirmed that it intended its jury instructions be freely available for use and reproduction by parties, attorneys, and the public, except as otherwise limited by the rule.[1]

[1] The council has always made its jury instructions freely available to the public on the California Courts website. See www.courts.ca.gov/partners/juryinstructions.htm.

This proposal has not been approved by the Judicial Council and is not intended to represent the views of the council, its Rules Committee, or its Legislation Committee. It is circulated for comment purposes only.

Around the time of that rule amendment, the council began registering a copyright with the United States Copyright Office for *CACI* and *CALCRIM*. Beginning with jury instructions that became effective in January 2006, the council expressly asserted copyright over and regularly registered with the United States Copyright Office the amended editions and annual supplements of *CACI* and *CALCRIM*. The publications, including the versions published on the court's website, contained copyright registration notices—for example, "© 2006."[2] Similarly, public-facing draft instructions in Judicial Council reports and Invitations to Comment contained a footer that read, "Copyright Judicial Council of California" or some variation of that statement.[3]

Following the United States Supreme Court's decision in *Georgia v. Public.Resource.Org, Inc. (Georgia)*,[4] Public.Resource.Org, Inc. (Public.Resource) asked the council to amend rule 2.1050, and to make corresponding changes to its jury instructions publications and associated California Courts web pages to clarify that the jury instructions are in the public domain and that the council does not assert copyright in those materials. Public.Resource requested these changes because it concluded that the jury instructions are not eligible for copyright protection under *Georgia*.[5]

In June 2021, relying on the *Georgia* decision, the Copyright Office declined to register the May 2019 Supplement to *CACI*.

In September 2022, the Rules Committee reported to the council that it would be working on this proposal to amend rule 2.1050. At that meeting, the council approved an update to *CALCRIM*, in which the jury instructions included with the council report did not contain representations concerning copyright. While reserving all intellectual property and proprietary rights under state and federal law, the council will cease registering a copyright in *CACI* and *CALCRIM*.

The Proposal

The Rules Committee recommends amending rule 2.1050, concerning public access, publication, and revision of the official jury instructions recommended for use in the state.

In subdivision (c), the proposal recommits to free public access for the jury instructions, including the council's continued provision of copies and updates of the approved jury instructions on the court's public website. Any implicit references to copyright, including

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[2] See, e.g., 2021 edition of *CACI*, at p. 2, www.courts.ca.gov/partners/documents/Judicial_Council_of_California_Civil_Jury_Instructions_2020.pdf.

[3] See, e.g., Invitation to Comment, CALCRIM-2022-01, at pp. 4–135, www.courts.ca.gov/documents/calcrim22-01.pdf.

[4] (2020) __ U.S. __ [140 S.Ct. 1498, 206 L.Ed.2d 732].

[5] The Court in *Georgia* held that, under the government edicts doctrine, annotations beneath the statutory provisions in the *Official Code of Georgia Annotated* are ineligible for copyright protection. (*Georgia, supra*, 140 S.Ct. at pp. 1503–1504.) Under the government edicts doctrine, "copyright does not vest in works that are (1) created by judges and legislators (2) in the course of their judicial and legislative duties." (*Id.* at p. 1508.)

"permission to publish" and "royalties," would be deleted, and the substance concerning publication of the instructions would be relocated to a new subdivision.

In new subdivision (d), entitled Publication, the proposal expresses the council's intent to enter into agreements to publish with an official publisher and other publishers. Subdivision (d) would maintain much of the substance of the current rule as it relates to protecting the integrity of the council's jury instructions. The council has an ongoing interest in publishers accurately publishing the Judicial Council's instructions, accurately crediting the Judicial Council as the source of the instructions, and publishers not falsely claiming copyright in *CACI* and *CALCRIM*.

Subdivision (e) would be clarified to reflect existing practice relating to consideration of suggestions for changes to the jury instructions. Law students, self-represented litigants, appellate justices, business entities, and nonprofits—to name just a few—submit proposals on jury instructions, and any proposal submitted is considered by the appropriate advisory committee on jury instructions. The current provision provides that trial judges and attorneys may submit proposals to the Legal Services office of the Judicial Council. The advisory committees, however, consider submissions on jury instruction content from anyone with a comment relevant to the jury instructions, not just trial judges and attorneys.

Alternatives Considered

The Rules Committee considered the changes to rule 2.1050 suggested by the nonprofit organization Public.Resource to declare the jury instructions "in the public domain" and that the council does not claim copyright in them. The committee decided it was not necessary to make those declarations. As described above, rule 2.1050(c) already states that the Judicial Council intends that the instructions be freely available for use and reproduction. The language related to royalties and permission to publish is proposed for deletion. In addition, the committee concluded that it is preferable to retain the language relating to accuracy and attribution. Even without copyright protections, the council has a significant interest in protecting the integrity of its jury instructions.

Fiscal and Operational Impacts

Operational impacts to the council from this rule amendment are expected to be minimal. Any fiscal impacts would not be from the proposed amendment but from no longer asserting copyright in the instructions, and even those are uncertain. Publishers who contract with the Judicial Council to publish jury instructions pay fees to the council. By statute, monies received from jury instruction publishers must be used "for the improvement of the jury system."[6] The committee believes the council's jury instructions have significant value, even without copyright protections. It is possible, however, that revenues will decrease over time as more copies of the jury instructions become available.

[6] Gov. Code, § 77209(h).

Attachments and Links

1. Cal. Rules of Court, rule 2.1050, at pages 5–6

Rule 2.1050 of the California Rules of Court would be amended, effective April 1, 2023, to read:

Rule 2.1050. Judicial Council jury instructions

(a)–(b) * * *

(c) Public access

The Judicial Council must provide copies and updates of the approved jury instructions to the public on the California Courts website. ~~The Judicial Council may contract with an official publisher to publish the instructions in both paper and electronic formats.~~ The Judicial Council intends that the instructions be freely available for use and reproduction ~~by parties, attorneys, and the public, except as limited by this subdivision~~. ~~The Judicial Council may take steps necessary to ensure that publication of the instructions by commercial publishers does not occur without its permission, including, without limitation, ensuring that commercial publishers accurately publish the Judicial Council's instructions, accurately credit the Judicial Council as the source of the instructions, and do not claim copyright of the instructions. The Judicial Council may require commercial publishers to pay fees or royalties in exchange for permission to publish the instructions. As used in this rule, "commercial publishers" means entities that publish works for sale, whether for profit or otherwise.~~

(d) Publication

The Judicial Council may contract with an official publisher and other publishers to publish the instructions in both paper and electronic formats. The Judicial Council may take appropriate actions to maintain the integrity of the jury instructions, including, without limitation, ensuring that publishers accurately publish the Judicial Council's instructions, accurately credit the Judicial Council as the source of the instructions, and do not claim copyright in the instructions.

~~(d)~~ (e)Updating and ~~amendments~~ revisions

The Judicial Council instructions will be regularly updated and maintained through its advisory committees on jury instructions. ~~Amendments~~ Revisions to these instructions will be circulated for public comment before publication. ~~Trial judges and attorneys~~ Suggestions for revising an instruction or creating new instructions may ~~submit~~ be submitted in writing ~~for the advisory committees' consideration suggestions for improving or modifying these instructions or creating new instructions~~, with an explanation of why the change is proposed~~. Suggestions should be sent~~ , to the Judicial Council of California, Legal Services.

Rule 2.1050 of the California Rules of Court would be amended, effective April 1, 2023, to read:

~~(e)~~ (f) Use of instructions

Use of the Judicial Council instructions is strongly encouraged. If the latest edition of the jury instructions approved by the Judicial Council contains an instruction applicable to a case and the trial judge determines that the jury should be instructed on the subject, it is recommended that the judge use the Judicial Council instruction unless ~~he or she~~ the judge finds that a different instruction would more accurately state the law and be understood by jurors. Whenever the latest edition of the Judicial Council jury instructions does not contain an instruction on a subject on which the trial judge determines that the jury should be instructed, or when a Judicial Council instruction cannot be modified to submit the issue properly, the instruction given on that subject should be accurate, brief, understandable, impartial, and free from argument.